No. 82-1260

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

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Dated: October 15, 1983

QUESTION PRESENTED

Whether petitioners, autonomously operated parent and subsidiary corporations, combined or conspired in violation of Section 1 of the Sherman Act, when they acted in concert to coerce third parties to boycott a new competitor.

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General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 33

In re Gibraltor Amusements, Ltd., 291 F.2d 22 (2d Cir.), *cert. denied*, 368 U.S. 925 (1961) 42

Glenny v. *American Metal Climax, Inc.*, 494 F.2d 651 (10th Cir. 1974) 43

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Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951) 56

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National Lead Co. v. *FTC*, 227 F.2d 825 (7th Cir. (1957) 54

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 27

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Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 47, 60

Schaben v. *Samuel Moore & Co.*, 606 F.2d 831 (8th Cir. 1979) 54

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Schine Chain Theatres, Inc. v. *United States*, 334 U.S. 110 (1948) 24

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21 Cong. Rec. 3151-53 (1890) 21

21 Cong. Rec. 4090 (1890) 21

Senate Judiciary Committee, 51st Cong., 1st Sess., Minutes (1890) 20

Other Authorities

ABA Monograph, *Antitrust Law Developments* (1975) 27

J. Bain, *Industrial Organization* (1959) 37

"The 'Affiliation' Problem in Banking," Speech by Donald I. Baker to the Federal Bar Association (September 14, 1972) 32

Barndt, *Two Trees Or One?—The Problem of Intra-Enterprise Conspiracy*, 23 Mont. L. Rev. 150 (1962) 45

Testimony of William F. Baxter, Assistant Attorney General, Antitrust Division, Concerning Competition in the Financial Services Industry, Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, June 8, 1983 32

Berle, *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343 (1947) 42

P. Blumberg, *The Law of Corporate Groups* (1983) 43, 47, 52

Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7 (1966) 20

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Brief for the United States, *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) 23, 52

F. Easterbrook and R. Posner, *Antitrust Law* (2d ed. 1981) 51

Fama, *Agency Problems and the Theory of the Firm*, 88 J. Pol. Econ. 288 (1980) 38

Jensen and Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 306 (1976) 37

E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1978) 16, 20

Kramer, *Does Concerted Action Solely Between A Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?* 11 Fed. Bar J. 130 (1951) 19

Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. Chi. L. Rev. 221 (1956) 21

Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 1983 Transfer Binder, Trade Reg. Rep. (CCH) ¶50,122 (Feb. 22, 1971) 31, 38

Marowitz, *The Antitrust Act and the Merger Case*, 17 Harv. L. Rev. 533 (1904) 18

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Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969) 57

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Report to the President and the Attorney General of the National Commission for the Review of the Antitrust Laws and Procedures (1979) 56, 57

Respondent's Joint Appeal Brief in *In The Matter of Borg-Warner Corp.*, F.T.C. Docket No. 9120.. 51

R. Rumelt, *Strategy, Structure and Economic Performance* (1974) 36

Stimson, *Trusts*, 1 Harv. L. Rev. 132 (1887) 19

L. Sullivan, *Law of Antitrust* (1977) 35, 45, 51

H. Thorelli, *The Federal Antitrust Policy* (1955) 18, 19, 20

Interview with Donald F. Turner, Assistant Attorney General, Antitrust Division, 34 Antitrust L. J. 113 (1967) 31, 46

United States Department of Justice, *Antitrust Guide for International Operations* (1977) 32

United States Department of Justice, *Merger Guidelines* (1982) 48

J. von Kalinowski, *Antitrust Laws and Trade Regulation* (1982) 51

J. Wert and G. Henderson, Jr., *Financing Business Firms* (6th ed. 1979) 47

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Weston, *The Application of the Sherman Act to "Integrated" and "Loose" Industrial Combinations*, 7 Law & Contemp. Prob. 42 (1940) ... 16

O. Williamson, *Markets and Hierarchies: Antitrust Analysis and Implications* (1975) 48

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Respondent, Independence Tube Corporation ("Independence"),[1] filed this action in 1976 in the United States District Court for the Northern District of Illinois, alleging, *inter alia*, that petitioners Copperweld Corporation ("Copperweld") and Regal Tube Company ("Regal") and others engaged in a combination or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. (15 U.S.C. § 1) The complaint alleged that petitioners' objective was to induce or to coerce the Yoder Company ("Yoder") and other firms to refuse to deal with Independence and to thereby prevent

[1] Independence has no parent or subsidiary corporations.

Independence from entering the structural steel tubing market in competition with Regal. Petitioners each filed counterclaims charging, *inter alia*, misappropriation of confidential information and trade secrets. At the conclusion of a ten-week trial, Senior Judge Hubert L. Will directed a verdict against petitioners on their counterclaims. The jury returned a verdict against petitioners on the antitrust and other claims, and that verdict was upheld by Judge Will on post-trial motions. The Court of Appeals for the Seventh Circuit unanimously affirmed the verdict and the District Court's judgment in all respects.

1. Statement of Facts

The following statement of the facts provides a more complete and accurate description of the relevant facts and circumstances of this case than that found in petitioners' brief:

Regal Acquisition. Regal, a manufacturer of structural steel tubing, was acquired by Copperweld from Lear Siegler, Inc. ("LSI") in 1972 as an "on-going business." Its acquisition represented an investment by Copperweld in a new market with a firm which "had its own management" and could operate independently. (Stip. 10, 15; T. 3029)[2] That management was to remain intact, Regal's manager was promised autonomy, and his compensation was linked to Regal's profits for which he alone would be responsible. Regal operated as a separate corporation and as a separate profit center because Copperweld's president, Phillip Smith, wanted it to "stand on its own two feet." (PX 995, 1081; J. App. A-111-13; T. 445-46, 3029-35, 3046-47, 3135-36, 3139, 4956-59, 4976-82, 6943-44) Bedford Foster, as president of Regal, assumed the "sole responsibility and authority over the entire operations" of the firm and testified that "in all material respects" the operations of Regal were controlled in Chicago, not in Pittsburgh where Copperweld was located. (PX 579; J. App. A-103; T. 1762-65)

[2] In this brief, "Cert. App." refers to petitioners' Appendix filed with their Petition for Writ of Certiorari; "J. App." refers to the parties' Joint Appendix; "Pet. Br." refers to Brief of Petitioners; "Stip." refers to Stipulation of Facts; "T." refers to Trial Transcript; "PX" refers to Plaintiff's Trial Exhibit; and "DX" refers to Defendants' Trial Exhibit. Reference to *"amici"* herein is to the *amici* generally who have filed briefs in support of petitioners.

All of Regal's management, employees and assets were in Chicago. Regal continued to have responsibility for its own customer and supplier relationships; operated its own manufacturing facilities; set its own prices; sold to Copperweld affiliates at market prices; conducted its own trade association activities; handled its own labor and personnel matters; conducted its own advertising and marketing studies; selected its own equipment; billed and collected its own receivables; maintained its own bank accounts, financial records, pension and benefit plans; and conducted its own engineering programs, product development, strategic business planning and acquisition searches. (Stip. 129-30, 170; PX 30, 34, 36, 43, 117, 133, 199, 247, 334, 473, 475, 998; J. App. A-8-37, 54; DX 574-87, 698-701; T. 2499, 2887-88, 2907, 2913, 4273-74, 4298, 4597, 4687, 4713-15, 4906-09, 4914, 4954-56, 4974, 5316, 5319, 5708, 6944, 6953-56)

Coercion of Independence Suppliers. Regal's president, David Grohne, left Regal when it was acquired by Copperweld and joined LSI. Later in 1972, he became involved in establishing Independence as a new structural tubing producer and subsequently left LSI. (Stip. 21, 26, 33-34; T. 207-12) When Foster of Regal learned that Independence was being formed, he reported the fact to Smith of Copperweld. They were aware of Grohne's reputation as a "price cutter," and Smith observed that the new enterprise "could create a problem for Regal." (PX 393; J. App. A-82; T. 1308, 1772-75) At that time, there were only a "few competing companies" that were able to produce the range of tubing sizes that Independence intended to produce, and Regal's market strategy was to "emphasize pricing stability" in that size range. (PX 30, 34, 448; J. App. A-16, 97) According to Copperweld's documents, it was the news of Independence's planned entry into competition with Regal which "led Bedford Foster to ask [Smith] to get something moving" with respect to Independence. (PX 1081)

Petitioners first asked their lawyers whether a noncompete provision in the acquisition agreement between LSI and Cop-

perweld could somehow be used to "stop Grohne," but Smith and Foster were advised by counsel that the "noncompete cannot be used against Grohne. . . ." (PX 394, 1055; J. App. A-83) Nevertheless, letters implying that Grohne was covered by the noncompete provision were prepared to be sent to Independence's potential equipment suppliers and financing sources. These letters threatened "any and all steps" to pursue petitioners' "rights" under the acquisition agreement and to protect Regal's alleged "trade secrets." (PX 168, 395; J. App. A-84; T. 6019, 6025) As Foster knew, however, and as William Jentes of the Kirkland & Ellis law firm later advised, Regal's operation "cannot be classified as involving trade secrets." (PX 1194; J. App. A-119, 122; T. 6049-51)

Petitioners retained a private investigator to conduct surveillance activities of Independence. When the investigator reported on February 19, 1973 that The Yoder Company ("Yoder") had just agreed to construct a $1,000,000 tube mill for Independence, Copperweld's Smith sent the previously prepared letters to Yoder, to the two other domestic mill manufacturers, to Chicago's two largest banks and to one of Independence's major financial backers. Foster provided Smith with addresses and other information concerning Yoder and the financial backer. Foster also advised Smith that Independence was negotiating with two industrial real estate firms with whom Regal had dealt in the past. Smith promptly sent additional letters to these firms on February 21, 1973. (PX 66, 132, 141, 168, 214, 236, 408, 413, 431, 443, 446, 718; J. App. A-38, 74, 79, 86, 92-95, 106; T. 1786-88)

Upon receiving the letter from Smith, Yoder recognized the intent was to "scare off potential suppliers and customers." Yoder promptly "complied with his wishes" and breached its contract to supply a mill to Independence, because it did not want to offend its "good customer and prospect, Copperweld." Yoder expected additional business from petitioners because of its refusal to deal with Independence. However, Yoder later protested that it had not received sufficient consideration from Regal on subsequent equipment purchases despite Yoder's

compliance with the boycott effort. Foster of Regal assured Yoder that it would receive proper consideration on future projects. (PX 77, 78, 94, 98, 411; J. App. A-88; T. 1113-14, 1118-19, 1124-26, 1428-29, 1432-34, 2659-61)

Independence protested to Copperweld that Yoder had breached its agreement to build a tube mill for Independence because of the Copperweld letter and requested that Copperweld confirm to Yoder that Grohne was not covered by a noncompete agreement. Copperweld refused to contact Yoder to clarify the matter. Instead, Smith suggested they "keep the pressure on" and further remarked that "there is plenty we can do to block Grohne." (PX 430, 433, 1060; J. App. A-90-91, 117) Petitioners subsequently sent second and third "notice" letters to some suppliers and met with others to discourage them from dealing with Independence under threat of litigation or withdrawal of petitioners' business. (PX 90, 92, 223, 237-38, 448-49, 451-53, 740, 1100, 1105; J. App. A-48, 97-99, 109; T. 498-502, 508-10, 1333-37, 1561-69, 2242-52, 2256, 2392-93, 2395-96, 2448-50, 2453, 2461-63, 2470-71, 2662-63, 2666-68, 2670, 2683-84, 4047-50)

Yoder's contract breach followed nine months of detailed negotiations with Independence. Independence was thus forced to attempt to locate another potential mill supplier and to begin negotiations anew. (Stip. 52, 119, 123; T. 315-18, 320) One of the remaining mill manufacturers, Abbey Etna Machine Company ("Abbey Etna"), had assured Regal's Foster that it "would certainly not be doing business" with Independence after it received the first of three letters from Copperweld. When Foster learned that Abbey Etna later agreed to supply a mill to Independence, he notified Smith of Copperweld and pointed out that the mill would cover "a most important part of our size range." Smith in turn told Abbey Etna's president that it would be "illegal" to supply the mill and threatened to sue both Abbey Etna and Grohne. (PX 448, 740; J. App. A-97, 109) Copperweld's attorneys had advised Smith that same day, however, that any such action would be

unsuccessful and would trigger a substantial antitrust counterclaim. Copperweld's law firm had previously warned of the danger of such an antitrust suit on the ground that petitioners "harrassed potential financial and equipment suppliers from doing business with him [Grohne], thus restricting competition." (PX 449, 481; J. App. A-99, 102) Nevertheless, Copperweld's general counsel, who was also a member of its board of directors, recommended that Grohne be "kept under continued surveillance and once he starts to operate or solicit business we should pounce on him." (PX 478; J. App. A-10)

Continental Illinois National Bank and Trust Company of Chicago had agreed to provide financing to Independence. After Smith was so informed by bank officials, he told them that petitioners were "considering discontinuing doing business with Continental" because of the bank's agreement to finance Independence. Copperweld counsel contacted the bank's president and its lawyers and stated that Copperweld would be filing an action against Independence. Thereupon, bank officials considered withdrawing the bank's loan commitment to Independence, and later refused to extend the term or increase the amount of the loan because of pressure from petitioners. Smith informed bank officials that he was "extremely angry" about the bank's dealings with Independence and that petitioners would be withdrawing their accounts. Subsequently, Copperweld and Regal closed their accounts at the bank. (PX 223, 658; T. 314, 499-503, 508-10, 2240-53, 2256, 2258-59, 2262-64, 2314-15, 2662-71, 2677-79, 2683-84, 2854, 2871-74, 3756-57)

When Regal learned that U. S. Steel Corporation was shipping steel to Independence in September 1974, it sent a letter to the company expressing "great concern" that U. S. Steel would supply Independence despite Regal's "long association" with U. S. Steel. At the same time, Copperweld and its general counsel made contacts with U. S. Steel in Pittsburgh expressing their "bitter disappointment" with the sales to Independence. U. S. Steel officials expressed "embarrassment," but made no commitment to stop dealing with Indepen-

dence completely. Soon thereafter, Regal "shut off" U. S. Steel as a supplier. (Stip. 146-47; PX 421, 562, 1100, 1105; T. 1333-37, 2137-43, 2147-48, 2392-96, 2433, 2448-53, 2457-66)

Injury to Competition. Petitioners' boycott efforts excluded Independence from the structural steel tubing market for at least nine months, and more probably a full year, and inhibited Independence's ability to effectively compete after its entry. Independence had been unable to start production before a steel shortage began, precluding Independence from obtaining a sufficient supply of steel. In addition, Independence was completely precluded from producing the larger sizes of tubing because the mill which it was finally able to obtain was smaller and weaker than the Yoder mill. As a result, Independence has been excluded from a portion of the market shared by very few firms, including Regal, and characterized by high prices and high profit margins. (PX 34, 52, 53, 770; J. App. A-16; T. 317-23, 328, 2399-2402, 2478-84, 6855, 6890-96, 8891-92, 9918-23)

Petitioners had recognized that Independence would be a "price cutter" and would likely introduce substantial price discounting in a market where price is the "primary determining factor to the customer." (PX 30; T. 1308) In fact, Regal limited its price increases beginning in March 1974, six months before Independence Tube began producing, so as not to "make it easy for Independence Tube to enter the market." (PX 43) But for petitioners' exclusionary efforts, that price moderation would have begun a year earlier.

Independence ultimately succeeded in bringing new price competition in tubing sizes where there had been high market concentration and little price competition. Regal attempted to preserve that price stability and to act as a price leader even after Independence entered the market. Nevertheless, throughout 1975 and 1976 Independence led a substantial price decline, forcing Regal and others to continually reduce their prices. Shortly thereafter, petitioners made unsuccessful overtures to acquire Independence. (PX 34, 106, 334, 473, 620; J. App. A-16; T. 352-54, 2313, 2477-84, 2891-2906, 3911-21, 4729-30, 6778-79)

2. Proceedings in the District Court

After presentation of the evidence at the liability trial, the court conducted an instruction conference with counsel for the parties. Petitioners tendered a jury instruction which provided in part:

> Sherman Act 1
> Legal Capacity of Regal and Copperweld to Conspire
>
> Further, with respect to Independence's allegation of a conspiracy between Copperweld and Regal Tube Company, I instruct you that before you may consider whether a conspiracy in fact existed between them, you must first determine whether these two companies are sufficiently distinct from each other to be separate actors in a conspiracy.
>
> * * * *
>
> A corporation as a matter of law may not conspire with its unincorporated division. However, under some circumstances a corporation may be legally capable of conspiring with its wholly owned subsidiary.
>
> * * * *
>
> If upon weighing all the factors listed above in light of the evidence presented at trial, you conclude that Regal Tube Company is not sufficiently distinct from Copperweld as an economic entity to be able to freely conspire with Copperweld, then you cannot enter a verdict in favor of the plaintiff on its antitrust claim under the Sherman Act based upon any alleged conspiracy between Copperweld and Regal. (Defendants' Revised Instruction 26)

Judge Will gave the foregoing instruction as requested by petitioners with minor modifications. (T. 8472-75)

The jury found that petitioners had formed a combination or conspiracy in violation of Section 1 of the Sherman Act which resulted in injury to Independence. The jury further

concluded that Yoder breached its contract with Independence but did not violate the Sherman Act.[3]

Although petitioners raised myriad issues in their post-trial motions, they did not contend that parent and subsidiary corporations should be held incapable of combining or conspiring with each other under the Sherman Act. In an extensive memorandum opinion, Judge Will concluded that petitioners had violated Section 1 of the Sherman Act, and he denied petitioners' post-trial motions in all respects. (Cert. App. B) As to the petitioners' "rationale" for contacting Independence's suppliers, the trial court stated "that the defendants' true motivation in writing to Yoder [and others] was to keep Independence out of the structural tubing market or to hamper its ability to compete there." (Cert. App. B-7; *see also* Cert. App. B-25)

3. The Seventh Circuit's Affirmance

The Court of Appeals for the Seventh Circuit unanimously upheld Judge Will's conclusions and affirmed the judgment in all respects. *Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982). Again, petitioners did not argue in their briefs that parent and subsidiary corporations were incapable of combining or conspiring under the Sherman Act. Rather, petitioners contended that they were not sufficiently separate in their operations to engage in concerted action with one another, and they complained that Judge Will's modification of their instruction had not adhered in every detail to *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

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[3] The jury was not specifically asked to determine whether Yoder was part of the combination or conspiracy, apart from the other elements of the Sherman Act offense. The jury answered negatively to the following interrogatory concerning Yoder:

> Did Independence Tube Corporation establish by a preponderance of evidence that Copperweld Corporation, Regal Tube Company and The Yoder Company combined or conspired against Independence Tube Corporation in violation of the antitrust laws and thereby proximately caused injury to Independence? (Interrogatories to the jury on liability issues, dated Feb. 17, 1981)

In an opinion written by Chief Judge Cummings, the Court of Appeals concluded that the trial court's jury charge which concentrated on "the practical relationship between the parent and the subsidiary" was correct in that it "focuses on the proper question—namely, when the distinction between affiliation and integration is trivial and when it is significant." The court found that Judge Will's charge "emphasized to the jury that they were looking for real, rather than merely formal, distinctness." (691 F.2d at 318-19; Cert. App. A-11-13) The court then reviewed some of the evidence of the autonomy of Regal's operation as follows:

> (1) Regal had existed as a division of C.E. Robinson Company and of Lear Siegler before its acquisition by Copperweld, and that Copperweld intended Regal to "keep its ongoing business and keep serving the market and customers it was already serving."
>
> (2) The acquisition of Regal did not have the practical effect of enabling Copperweld to handle additional steps in its own manufacturing process (comparable to the forward integration found in *Photovest*), but established Copperweld in an entirely new line.
>
> (3) Regal management had real autonomy in both day-to-day and policy decisions.
>
> (4) Not only were Regal's expenses and revenues segregated but Regal's operating manager's compensation was based primarily on Regal profitability.
>
> (5) Regal had a separate sales force and clientele (until the 1979 reorganization of Copperweld's subsidiaries) and made its own arrangements with suppliers of equipment and raw materials—a fact relevant to the ability of the defendants to bring pressure to bear on more people if they worked together than either could alone or than both could if Regal were a full-fledged division. (691 F.2d at 320; Cert. App. A-16-17 (citations omitted))

The court found that petitioners' rationale for contacting Independence's suppliers was "probably specious," citing the observation of William Jentes, Copperweld's attorney, "that

Regal had taken no steps whatsoever" to preserve confidentiality. (PX 1194; J. App. 119-127) Thus, the court stated:

> [I]f notice rather than intimidation had been the purpose of Copperweld's campaign, one letter to Yoder would have served. A second and third were in fact sent. If protection of Regal's proprietary interest had been the rationale, *then Copperweld's actions were premature and probably specious.* We would therefore have affirmed the jury's findings if we had had to reach them on the antitrust appeal. . . . (691 F.2d at 325; Cert. App. A-27 (footnotes and citations omitted) (emphasis added))

SUMMARY OF ARGUMENT

The Court is presented here with the narrow question of whether a parent corporation and its autonomously operated subsidiary participated in a "combination" or "conspiracy" within the meaning of Section 1 of the Sherman Act when they engaged in concerted actions to coerce third persons to boycott a new competitor. Copperweld and Regal each used the economic leverage of its individual commercial contacts to persuade other firms to refuse to deal with Independence, which they expected to be a "price cutter" in the structural steel tubing market. They succeeded in precluding Independence's entry for a substantial period and in permanently excluding it from a segment of the market, thereby reducing product supply and frustrating price competition. This is the "concrete" case that the Court is called upon to decide, rather than the "abstract propositions of law" offered by petitioners. *Upjohn Co.* v. *United States,* 449 U.S. 383, 386 (1981).

I.

Section 1 of the Sherman Act prohibits "every" combination or conspiracy that unreasonably restrains trade. Separate though affiliated corporations are separate legal persons and provide the plurality of actors necessary to satisfy the literal requirements of the statute. However, whether parent and subsidiary corporations should be held capable of engaging in a combination or conspiracy in a particular case should ultimately turn upon a consideration of the objectives of the statute. One

of the principal objectives of Section 1 was to preserve competition by prohibiting concerted predatory conduct designed to prevent the entry of new competitors, precisely the type of activity involved in this case. Congress intended the broad common law terms "combination" and "conspiracy" to be interpreted liberally to achieve these statutory objectives. Indeed, the framers of the Sherman Act specifically recognized that anticompetitive results could be achieved by a combination of affiliated corporations, each of which is a "creature by itself." 21 Cong. Rec. 2571 (1890) (statement of Sen. Teller).

Some of the earliest decisions of this Court under Section 1 of the Sherman Act held that affiliated corporations which had engaged in concerted anticompetitive conduct constituted a "combination" under Section 1. *See, e.g., Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 74 (1911). In *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947), the Court refused to create an exemption for anticompetitive activities of affiliated corporations, stating that common ownership and control are "impotent" to liberate such a combination or conspiracy from the impact of the Act. This doctrine has been consistently reaffirmed by the Court in the succeeding decades, often at the urging of the United States as plaintiff or as *amicus curiae*.

The *Report of the Attorney General's National Committee to Study the Antitrust Laws* 34 (1955) described the essence of the Supreme Court decisions as prohibiting parent and subsidiary combinations which impose unreasonable restraints on the trade of "strangers to those acting in concert." The enforcement policy statements of the Antitrust Division of the Justice Department have consistently supported this position. The government's brief in this case represents the first time in almost a century of Sherman Act enforcement that it has urged the Court to exempt the predatory activities of affiliated corporations from Section 1 of the Sherman Act.

II.

The principles established by the decisions of the Court are rational and workable. The application of those principles by

the lower courts has involved a consideration of (1) whether the affiliated corporations functioned as distinct economic units, and (2) whether each corporation engaged in activities to unreasonably restrain the trade of third parties. This approach involves a realistic analysis of the actual operation of the separate corporations and is consistent with economic principles which recognize that an autonomous corporate entity engages in contractual and other business relationships which create an economic impact. When such corporations combine the leverage of their individual business relationships to strengthen an anticompetitive assault, as petitioners did here, the principles of the antitrust laws are transgressed. On the other hand, "actions of affiliated corporations which touch only on internal operations and have no anti-competitive consequences cannot violate § 1." *Thomsen* v. *Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982). These principles are consistent with the Court's consideration of parent-subsidiary relationships in other areas of the law, which has always turned upon the fundamental policies of the particular statute involved and the indicia of corporate independence.

The lower courts have applied the doctrine developed in the Supreme Court cases with great sensitivity to the legitimate activities of affiliated corporations. Petitioners have therefore been unable to cite a single case in which application of the doctrine has led to a perverse result; nor is there any evidence to suggest that the Court's decisions have discouraged the creation of subsidiary corporations or inhibited business efficiency. Since liability may be imposed only in those narrow circumstances involving concerted predatory conduct, formation of subsidiaries for legitimate business purposes is not discouraged.

III.

Petitioners and *amici* have requested the Court to create a new rule of law under which any number of separate corpo-

rations affiliated through majority stock ownership would nevertheless always be held to constitute a single legal person, incapable of violating Section 1 of the Sherman Act. The creation of such a rule would ignore the substance of the relationship between the corporations and the anticompetitive effects of their activities and would produce random results dictated by varying levels of stock ownership rather than by Sherman Act objectives. Petitioners' proposal would also conflict with the principles established under other antitrust provisions. Under Section 2 of the Sherman Act, Section 8 of the Clayton Act and other antitrust statutes, the courts have examined the actual relationship of affiliated corporations and their activities rather than considering only the level of stock ownership.

The exemption of affiliated corporations from Section 1 would leave victims injured by anticompetitive activities of such corporations without an antitrust remedy. Contrary to petitioners' assertion, predatory practices of affiliated corporations are not adequately addressed under Section 2 of the Sherman Act or other laws. For this reason, the *Attorney General's Report* concluded that Section 1 should be applied to coercive conduct of a parent and subsidiary "though short of an attempt to monopolize." (*Id.* at 35)

IV.

This Court has repeatedly held that the doctrine of *stare decisis* remains a foundation stone of jurisprudence. Here, the petitioners request that the Court ignore that doctrine and overrule a long line of its decisions which were based upon the Court's interpretation of the Sherman Act in light of its legislative objectives. Petitioners thus seek a reconsideration and reversal of fundamental antitrust law and policy as established by Congress. The Court has always held that such reassessments of competing economic and public policy considerations could be made only by Congress.

ARGUMENT

I. THE DECISIONS OF THIS COURT APPLYING THE SHERMAN ACT TO AFFILIATED CORPORATIONS ARE IN ACCORD WITH THE LEGISLATIVE HISTORY AND STATUTORY OBJECTIVES OF THE ACT.

Throughout the 93-year history of the Sherman Act, the Court has been presented time and again with the issue of whether affiliated corporations which have engaged in concerted anticompetitive action formed a "combination" or "conspiracy" within the meaning of the Sherman Act. The Court has consistently held that where such anticompetitive trade restraints have occurred, it is not a defense that the perpetrators were parent and subsidiary or commonly-owned corporations. Petitioners and *amici* attack those decisions and request that they be overruled. Those decisions, however, are in accord with the legislative history and objectives of the Sherman Act.

A. The Statutory Language and Legislative History Establish that Affiliated Corporations are Capable of Combining and Conspiring Under The Sherman Act.

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." (15 U.S.C. § 1) The statute is broad and unequivocal in its coverage. It prohibits "every" form of concerted activity that has the requisite trade restraining effect and makes no exception for affiliated businesses.

There is no doubt that parent and subsidiary corporations are separate legal entities, and as such provide the plurality of actors necessary to meet the literal statutory requirement. The United States concedes as much. (U.S. Br. 13) Moreover, petitioners and the United States do not dispute the proposition that whether affiliated corporations are capable of engaging in a combination or conspiracy should turn upon a consideration of the objectives of the statute. They assert, however, that those

objectives are *never* achieved by holding that such corporations may constitute a combination or conspiracy. Respondent submits that where affiliated but autonomously operated corporations combine their economic leverage to prevent the emergence of new competition to the detriment of consumers, fundamental Sherman Act objectives are infringed, and such business entities should not be excused from the prohibitions of the Act.[4]

This Court has observed that the "Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958). *See also* 21 Cong. Rec. 2461 (1890) (statement of Sen. Sherman).[5] Section 1 of the statute was intended to preserve competition by proscribing two types of practices prohibited by common law: (1) arrangements that eliminate or restrict competition between business units which would otherwise compete with one another; and (2) concerted actions that coercively restrict the competitive opportunity or commercial freedom of others. *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 59 (1911); Weston, *The Application of the Sherman Act to "Integrated" and "Loose" Industrial Combinations*, 7 Law & Contemp. Prob. 42, 51 (1940). Petitioners, the United States and other *amici* choose to focus on the first of these objectives while they largely ignore the second. (Pet. Br. 21-22; U.S. Br. 10, 14-16; Kaiser Br. 18)

This case, however, does not involve collusive practices among competitors. It involves the second Sherman Act

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[4] Petitioners and the United States do concede that corporations related by stock ownership are capable of engaging in a combination where the level of stock ownership is 50% or under, but they would create an absolute exemption for all corporations whose ownership exceeds that level. (Pet. Br. 42 n.33; U.S. Br. 21 n.31)

[5] Except as otherwise noted, all citations to the legislative history of the Sherman Act can be found in E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 113-28, 158-59, 177, 182, 284, 292-94, 300-02 (1978). Except as otherwise indicated, all references to Sherman Act debates concern the concepts embodied in Section 1.

objective, the preservation of competitive opportunity. Here, the petitioners combined their economic power for the purpose of establishing a supplier boycott of a new competitor, resulting in diminished product supply and the frustration of price competition. Such conduct clearly poses a significant threat to competition and cannot in any way be characterized as pro-competitive or even neutral activity.

This Court has always held that the protection of competitive opportunity from such predatory efforts is an important Sherman Act objective. Thus, the Court has consistently prohibited joint exclusionary activities because "[m]onopoly can as surely thrive by the elimination of . . . small businessmen, one at a time, as it can by driving them out in large groups." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959). As the Court stated more recently, "the freedom guaranteed each and every business, no matter how small, is the freedom to compete. . . ." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). *See also United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). These principles derive from the basic common law values which Senator Sherman sought to protect: "[i]t is the right of every man to work, labor, and produce in any lawful vocation. . . . This is industrial liberty and lies at the foundation of the equality of all rights and privileges." 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman). *See also* 21 Cong. Rec. 3147 (1890) (statement of Sen. George).[6]

Thus, one of the important legislative concerns of Section 1 was preservation of the opportunity for *new* " decision makers"

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[6] Senator Sherman further stated:

> I am not opposed to combinations in and of themselves; I do not care how much men combine for proper objects; *but when they combine with the purpose to prevent competition, so that if a humble man starts a business in opposition to them . . . they will crowd him down . . . then it is the duty of the courts to intervene* . . . . (21 Cong. Rec. 2569 (1890) (emphasis added))

Amicus Kaiser Aluminum quoted the first phrase, but deleted the emphasized language. (Kaiser Br. 18)

to enter the market free of predatory restraints imposed by others. In describing this objective as one drawn from the common law, Justice Holmes stated:

> Combinations or conspiracies in restraint of trade . . . were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. (*Northern Securities Co.* v. *United States,* 193 U.S. 197, 404 (Holmes, J., dissenting))

Congress intended that the Sherman Act have the widest application to prohibit such restraints in whatever form imposed, including combinations of affiliated corporations. *Standard Oil, supra,* 221 U.S. at 59-60. The term "combination" in particular was an all embracing term in its contemporary usage as well as in its common-law meaning, referring to any "combination of labor and capital."[7] Senator Sherman stated that even a partnership or corporation "is a combination" which, when used to restrain trade, "is aimed at by this bill." 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman). *See also* Marowitz, *The Antitrust Act and the Merger Case,* 17 Harv. L. Rev. 533, 534-35 (1904). The commercial trusts of the day were simply regarded as "a new form of combination." 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman). *See also* H. Thorelli, *The Federal Antitrust Policy* 84-85 (1955) ("the 'trust problem' in contemporary debate [arose] . . . from the existence of all kinds of combinations, from the simple agreements and pools to the holding companies (as far as they

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[7] This Court has attributed a broader sweep to the term "combination" than to the term "conspiracy." *See, e.g., Albrecht* v. *Herald Co.,* 390 U.S. 145, 149 (1968); *United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 44 (1960).

had come into existence) and mergers."). The common-law concept of "conspiracy" adopted by the statute had a similarly expansive application.[8]

Senator Sherman described this intentionally broad statutory sweep in terms of the common-law cases:

> . . . whether . . . combinations are by individuals, partnerships, or corporations, when the purpose of the combination or its plain tendency is to prevent competition, the courts have enforced the rule of the common law and have vigorously used the judicial power in subverting them. (21 Cong. Rec. 2459 (1890))[9]

Thus, in light of the Act's legislative history, one antitrust scholar concluded that Congress intended the Act "to be flexible" so as to preclude "[r]estrainers of trade" from finding "subterfuge behind new forms of combinations or methods. What mattered was whether trade *was restrained.*" H. Thorelli, *supra,* at 229 (1955) (emphasis in original).

Multi-corporate enterprises were known and feared by the framers of the Sherman Act, and it is clear that they viewed separately incorporated but affiliated corporations as subject to the combination provision of the statute.[10] The phrase "in the

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[8] Indeed, the United States has filed antitrust actions alleging a conspiracy between a corporation and its officers, contending "that there is no reason of language why the Sherman Act should receive an interpretation different from that which has been given to other conspiracy statutes." *United States* v. *Lorain Journal Co.*, 92 F. Supp. 794, 800 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951). *See generally* Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?*, 11 Fed. Bar J. 130 (1951).

[9] At least one of the cases cited by Senator Sherman involved parent-subsidiary exclusionary conduct. *See People ex. rel. Peabody* v. *Chicago Gas Trust Co.*, 130 Ill. 268, 22 N.E. 798 (1889), *cited at* 21 Cong. Rec. 2459 (1890) (statement of Sen. Sherman).

[10] Contrary to the contention of *amicus* Kaiser, affiliated corporations did exist at that time. (Kaiser Br. 18) Indeed, as early as 1887 at least one commentator called for complete prohibition of stock ownership by corporations. Stimson, *Trusts*, 1 Harv. L. Rev. 132, 148 (1887).

form of trust *or otherwise*" following the word "combination" was added during final Committee revisions to clearly indicate that the term combination was not to be limited to the trust device. Senate Judiciary Committee, 51st Cong., 1st Sess., Minutes 227 (1890) (available in National Archives, Washington, D.C.). *See also Northern Securities, supra,* 193 U.S. at 327 ("This combination is, within the meaning of the act, a 'trust,' but if not, it is a combination. . . .")

Senators Teller and Sherman both alluded to the potential danger of anticompetitive schemes perpetrated by separate but commonly-owned corporations. 21 Cong. Rec. 2562, 2569 (1890) (statements of Sens. Sherman, Teller).[11] In summarizing the legislative history, Judge Bork indicated that the term "combination" refers to "common ownership and control." Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J.L. & Econ. 7, 22 (1966).

Senator Teller specifically indicated that affiliated corporations were each considered distinct persons when he stated, with respect to the Standard Oil Trust, that "[e]ach corporation is a creature by itself." 21 Cong. Rec. 2571 (1890) (statement of Sen. Teller). *See also* 21 Cong. Rec. 2457-60 (1890) (statement of Sen. Sherman). Section 8 of the Act was thus added by the Senate Judiciary Committee to make it clear that "the term 'persons' was intended to apply to corporations."[12] E. Kintner, *The Legislative History of the Antitrust Laws and Related Statutes* 23 n.1.150 (1978).

Petitioners and the United States totally disregard the legislative history and the common law foundations of the Sherman Act. They rely solely upon the novel notion that Congress intended to create a "dichotomy" between Sections 1 and 2 of the Sherman Act, thereby allowing anticompetitive practices of affiliated corporations to substantially escape Sher-

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[11] *See also* E. Kintner, *supra,* at 10; H. Thorelli, *The Federal Antitrust Policy* 78-79 (1955) (Thorelli discusses the Cordage Trust, formed in 1887, which established a "joint subsidiary.")

[12] Section 8 provides that "[t]he word 'person' . . . shall be deemed to include corporations. . . ." (15 U.S.C. § 7)

man Act coverage. Thus, they argue that multi-party behavior is treated under the "strict" standard of Section 1, while unilateral behavior is covered by the more "lenient" standard of Section 2. (Pet. Br. 21; U.S. Br. 8-12) The conduct of affiliated corporations, they contend, should always be considered unilateral and therefore subject to the more lenient standard. This latter day artificial construct begs the basic question of whether the joint actions of affiliated corporations are within Section 1 by reason of the statutory language, legislative intent and the applicable decisions. Moreover, petitioners' argument is not supported by the "statutory scheme" of the Sherman Act.

As the Court pointed out in *Standard Oil, supra,* 221 U.S. at 60, Section 2 "was intended to supplement the first [section] to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded." Indeed, Section 2 was added to the basic statute by the Senate Judiciary Committee and was adopted with little debate. 21 Cong. Rec. 3151-53, 4090 (1890). *See generally* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. Chi. L. Rev. 221 (1956). Congress thus intended to create no "dichotomy;" the prohibition was upon a continuum of practices, beginning with trade restraints which tend toward monopoly and progressing to the unlawful achievement of monopoly. *Northern Securities Co., supra,* 193 U.S. at 404-05 (Holmes, J., dissenting).

Furthermore, the language of both Sections 1 and 2 refers to combinations and conspiracies. Section 2 provides that it is unlawful for any "person" to monopolize, attempt to monopolize or "combine or conspire to . . . monopolize." (15 U.S.C. § 2) While Section 2 is concerned in part with individual monopolistic conduct, it is not so limited. Therefore, the issue concerning the status of affiliated corporations arises under both Section 1 and Section 2. *See, e.g., Brager & Company, Inc.* v. *Leumi Securities Corp.,* 429 F. Supp. 1341, 1346 (S.D.N.Y.

1977), *aff'd*, 646 F.2d 559 (2d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981). In fact, the Court has held that the standards for establishing a combination are identical under both sections. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-10 (1946). Thus, the "statutory scheme" constructed by the petitioners and the United States is at odds with both the language and legislative history of the Act.

This Court has long held that the Sherman Act must be interpreted "in the light of its legislative history and of the particular evils at which the legislation was aimed." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940). That legislative history, which petitioners ignore, demonstrates that the Fifty-first Congress clearly intended Section 1 of the Act to have the broadest application, with its focus on the anticompetitive effects of given practices regardless of whether the persons engaging in them are affiliated corporations. This Court has always so held.

B. The Decisions of this Court Unequivocally Hold that Affiliated Corporations are Capable of Combining and Conspiring Under the Sherman Act.

In the first Sherman Act cases to reach this Court, the Court held that affiliated corporations can constitute a "combination" within the meaning of the Act. Thus, in *Standard Oil, supra*, the Court concluded that the Standard Oil holding company and its subsidiary corporations were a "combination" under Section 1 and that the activities in which they together engaged after their affiliation constituted unreasonable trade restraints. (221 U.S. at 74)[13] *See also Northern Securities,*

[13] The defendants in *Standard Oil* argued, as do petitioners here, that "[b]ecause of the common ownership . . . they were not independent or competitive but they were the constituent elements of a single business organism." (221 U.S. at 8) *See also* 221 U.S. at 4, 5, 14. The Court adopted the government's view that, "[t]he inhibition against the suppression of competition by any instrumentality . . . applies to all corporations and all devices. The real point is not the instrumentality or the scheme used to suppress the competition, but whether competition is thus suppressed and trade restrained. . . ." (221 U.S. at 23)

supra, 193 U.S. at 327. *Standard Oil* was followed by *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911), in which the defendant and five of its "accessory corporations" were charged with conspiracy. The Court held that American Tobacco and its subsidiary corporations violated Section 1, stating: "[T]he combination as a whole, involving all its cooperating or associated parts, *in whatever form clothed*, constitutes a restraint of trade within the first section. . . ." (*Id.* at 184 (emphasis added)) In *United States* v. *United States Steel Corp.*, 251 U.S. 417, 454-57 (1920), this Court made it clear that its holdings in *Standard Oil* and *American Tobacco* were based on the predatory acts of the affiliated corporations and not the mere fact of affiliation. *See also United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 376-77 (1933).

In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), however, the Court was asked to create an exemption from Sherman Act coverage for parent and subsidiary corporations. There, the United States charged that a group of affiliated corporations excluded competing taxi cab manufacturers from access to the market by agreeing to purchase only from a manufacturing affiliate. The government argued that the subsidiary corporations were separate economic units and not merely *alter egos* of the parent and that "100% stock ownership in a subsidiary does not negative the possibility that the parent and the subsidiary have entered into an unlawful conspiracy in restraint of trade." (Brief for the United States at 40, *United States* v. *Yellow Cab Co.*, *supra*) In refusing to create an exemption for affiliated corporations, the Court stated:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any

> affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. See *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 360-361, 376-377.
>
> And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. (332 U.S. at 227)

Thus, the Court's interpretation of the conspiracy language of Section 1 gave meaning to the ultimate objective of the statute, the prevention of unreasonable restraints on competitive freedom, particularly where the activities excluded third parties.[14]

Yellow Cab was followed by *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110 (1948), in which a parent and its wholly-owned subsidiary corporations were charged with engaging in practices designed to destroy or exclude competitors. Defendants argued there, as petitioners do here, that:

> wholly-owned subsidiary companies, while they may serve to insulate the parent company from liability . . . can hardly be regarded from the standpoint of the Sherman Act as having separate and independent wills, so that their coming together with the parent company in a common purpose can create a conspiracy. (Brief for Appellants at 71, *Schine Chain Theatres, Inc.* v. *United States, supra*)

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[14] Petitioners and *amici* attempt to explain away *Yellow Cab* by suggesting that corporate acquisitions rather than post-acquisition behavior formed the basis of the Court's decision. (Pet. Br. 27; U.S. Br. 18) Such an interpretation of *Yellow Cab,* however, was specifically rejected by the Court in *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 522 (1948) (emphasis added): "In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, *not that corporate integration violated the act.*"

The Court rejected this argument and adopted the government's request to reaffirm its holding in *Yellow Cab*, stating that the members of the combination were "not immunized by reason of" their affiliation. (334 U.S. at 116)

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), the Court reaffirmed this principle once again. *Kiefer-Stewart* involved the coordinated activities of corporate subsidiaries to boycott a dealer for the purpose of controlling retail price levels. The United States filed a brief as *amicus curiae* urging the Court to hold that respondents had engaged in a price fixing conspiracy in violation of Section 1 of the Sherman Act. The Court, in so holding, stated:

> Respondents next suggest that their status as "mere instrumentalities of a single manufacturing-merchandising unit" makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E.g., United States* v. *Yellow Cab Co.*, 332 U.S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors. (340 U.S. at 215)

Petitioners attempt to distinguish the *Kiefer-Stewart* opinion by asserting that the Court *might* have found other grounds to decide the case, *i.e.*, the existence of a conspiracy between defendants and plaintiff. (Pet. Br. 28) The fact is that the case was not decided on other grounds.[15]

The government again challenged activities of affiliated corporations in *Timken Roller Bearing Co.* v. *United States*,

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[15] Petitioners' attempt to distinguish the opinion fails on two counts: first, there was no evidence in *Kiefer-Stewart* that plaintiff had agreed to maintain prices; and second, the proposition that a plaintiff could conspire with a defendant did not develop until *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), almost ten years later.

341 U.S. 593 (1951), wherein defendants were charged with concerted behavior designed to eliminate all competition among themselves and with competing firms. The defendants argued there, as petitioners do here, that the corporations involved constituted a single enterprise incapable of conspiring under the Sherman Act. In urging the Court to reaffirm the application of the Sherman Act to such affiliated corporations, the government pointed out in oral argument:

> While courts sometimes look beyond corporate entities, they do so when it will serve the public interest, not when it will serve the interest of particular individuals. (19 U.S.L.W. 3293 (May 1, 1951))

In finding for the government, the Court reiterated that "common ownership or control . . . does not liberate [corporations] from the impact of the antitrust laws." (341 U.S. at 598) Petitioners rely upon the dissents in *Timken* as postulating the proper approach. Those dissents, however, were concerned solely with foreign commerce and provide no support for the notion that affiliated corporations lack the capacity to conspire.[16]

The foregoing decisions have consistently been read to apply only to trade restraints aimed at suppressing the competition of parties not within the affiliated group. They do not represent an invasion of the normal business relationships between affiliated corporations. Thus, *The Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) (hereafter "*Attorney General's Report*") stated:

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[16] Justice Frankfurter specifically stated that "the circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint of trade." (341 U.S. at 605) Justice Jackson added: "It is one thing for competitors or a parent and its subsidiaries to divide the United States domestic market" and quite another when such conduct involves foreign markets. (*Id.* at 608)

> Neither *Kiefer-Stewart* nor *Timken* hold that restraint of trade of one's subsidiaries by agreement with or between the subsidiaries is illegal in the absence of a purpose and effect to restrain the trade of others not members of the corporate family. (*Attorney General's Report, supra,* at 34)

The *Attorney General's Report* described the essence of the Court's decisions as follows:

> The substance of the Supreme Court decisions is that concerted action between parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1. Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated. (*Attorney General's Report, supra,* at 34)

See also ABA Monograph, *Antitrust Law Developments* 33 (1975). The *Attorney General's Report* specifically concluded that Section 1 may be transgressed where, as here, "a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor. . . ." (*Id.* at 35)[17]

Thus, the concern expressed by petitioners and *amici* that the Court's decisions stand for the proposition that related

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[17] The Attorney General's Committee consisted of lawyers, law professors, and economists who were "specialists in the antitrust or cognate fields." *Attorney General's Report, supra,* at iv. The Assistant Attorney General, Antitrust Division, Stanley N. Barnes, was Co-Chairman and the Chairman of the Federal Trade Commission was a member of the Committee. Since its publication, this Court has frequently relied on the *Attorney General's Report's* analysis of the antitrust laws. *See, e.g., Falls City Industries, Inc.* v. *Vanco Beverage, Inc.,* 103 S. Ct. 1282, 1294-95 (1983); *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 439-40 (1978); *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 690-92 (1978); *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 176 (1964).

corporations may not lawfully coordinate their organizational or marketing activities is unfounded. Indeed, the subsequent decisions of this Court further reinforce the conclusions of the *Attorney General's Report*. *See, e.g., Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Fortner Enterprises* v. *United States Steel Corp.*, 394 U.S. 495 (1969) ("*Fortner I*"); *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975); *United States Steel Corp.* v. *Fortner Enterprises*, 429 U.S. 610 (1977) ("*Fortner II*").

In *Sunkist, supra*, the Court was presented with a question of interpretation of the Capper-Volstead agricultural exemption from the antitrust laws. (15 U.S.C. § 17) Although the Court had no occasion specifically to discuss the combination or conspiracy language of the Sherman Act or to cite its earlier decisions on the subject, it noted the importance of the operational realities of the separate corporations:

> There is no indication that the use of separate corporations had significance in itself or that outsiders considered and dealt with the three entities as independent organizations. (370 U.S. at 29)

The Court concluded that Congress intended to exempt such arrangements where the parties had "banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts." (*Id.* at 29) Of course, there is no similar statutory exemption here which would protect the activities of petitioners to intentionally suppress competition, although they now request the Court to judicially create such an exemption.

In *Perma Life, supra*, the Court reaffirmed that no such judicial exemption is permissible. There, the lower court had dismissed a complaint alleging a conspiracy among commonly-owned corporations. In remanding for trial, the Court reiterated the fact that common ownership does not remove the

legal ability of separate corporations to combine or relieve them of the "obligations that the law imposes on separate entities." (392 U.S. at 141-42)[18]

In *Fortner I, supra,* the plaintiff charged an agreement between a parent and a wholly-owned subsidiary corporation to impose a tying arrangement on customers. Citing its previous parent-subsidiary decisions, the Court held that a violation could be found where "credit is provided by one corporation on condition that a product be purchased from a separate corporation. . . ." (394 U.S. at 507) *See also Fortner II, supra,* 429 U.S. at 623 (Burger, C.J. and Rehnquist, J., concurring).

In *Citizens & Southern, supra,* the United States filed an action alleging price fixing and challenging certain correspondent relationships between a bank and partially owned *de facto* branches which it had established. The Court reaffirmed that corporate "interrelationships . . . are not determinative of the applicability of the Sherman Act." (422 U.S. at 116, *citing, Yellow Cab, supra*) The Court went on to consider the nature and extent of the corporate relationships and activities, and concluded that the purpose and effect of the challenged arrangements were to promote competition rather than to defeat it, and therefore the arrangements did not infringe Section 1 of the Sherman Act. (422 U.S. at 118-20)

Thus, throughout the history of Sherman Act enforcement, the Court's framework for analysis has been consistent and rational. Where the purpose or effect of concerted conduct is the suppression of competition, the Court has concluded that corporate affiliation is no defense; where the conduct involves only internal management activities, the Court has found that antitrust concerns are not implicated. Such an analysis gives

[18] Petitioners suggest that the main opinion in *Perma Life* represented the view of only four members of the Court. (Pet. Br. 31) That is clearly incorrect. The concurring opinions as well as the partial dissents all adopted the main opinion on the parent-subsidiary question, but expressed differing views on the *in pari delicto* issue.

meaning to the congressional objective of the Sherman Act to preserve competition, yet at the same time insures the freedom of businesses to organize in any way which they deem appropriate.

These decisions are not fraught with "grave deficiencies," nor can they be explained on other grounds as now suggested by petitioners. (Pet. Br. 32, 25) In fact, petitioners recognized these inescapable holdings when they tendered their jury instruction in the district court which stated in no uncertain terms that "a corporation may be legally capable of conspiring with its wholly owned subsidiary." (Defts. Revised Instruction No. 26)[19]

C. The Government Antitrust Enforcement Agencies have Consistently Interpreted Section 1 as Applying to Affiliated Corporations.

Since adoption of the Sherman Act, the United States has repeatedly initiated enforcement actions against affiliated corporations under Section 1. In this Court alone, the government has successfully argued for the application of Section 1 to the joint conduct of affiliated corporations in at least ten cases over an 80 year period, either as a plaintiff or as *amicus*.[20]

In addition to its prosecution activities, the Antitrust Division of the Justice Department has consistently made enforce-

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[19] The instruction as tendered by petitioners was given by Judge Will to the jury in slightly modified form. Consequently, petitioners' briefs in the trial court and the Court of Appeals did not question the capacity of affiliated corporations to combine under Section 1. *See United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). *See also Bowen* v. *United States Postal Service*, 103 S. Ct. 588, 599 n.19 (1983); Fed. R. Civ. P. 51 (error may not be assigned to instruction where no objection was made).

[20] The government has continued to file cases against parent and subsidiary conspiracies under Section 1 in recent years. *See e.g.*, *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *United States* v. *Cambridge-Lee Industries Inc.*, Cr. No. 83-00107 (E.D. Pa. filed March 18, 1983); *United States* v. *Central State Bank*, 564 F. Supp. 1478 (W.D. Mich. 1983).

ment policy statements supporting the application of Section 1 to affiliated corporations. For example, in 1967 in connection with the filing of *United States* v. *General Tire & Rubber Co.*, Civil No. 67-155 (N.D. Ohio filed March 2, 1967), alleging a parent-subsidiary combination, Assistant Attorney General Donald F. Turner stated:

> [A]s the law has developed in this area it has been thought appropriate to apply the conspiracy concept to the activities of a group of closely related corporations where the conduct involved is beyond defense and involves coercion of outsiders. (Interview with Donald F. Turner, Assistant Attorney General, Antitrust Division, 34 Antitrust L.J. 113, 123 (1967))

Similarly, in 1971, Assistant Attorney General (later Judge) Richard W. McLaren set forth the Antitrust Division's enforcement policy of challenging practices of commonly-controlled firms "where the practice has a coercive or restrictive effect on outsiders." He further stated:

> [W]e have limited our use of the intraenterprise doctrine to situations in which the commonly-controlled firms *have pooled their power in a manner which has adverse competitive effects on independent business entities.* See *United States* v. *General Tire Co.*, et al., D.C.N.D. Ohio, Civil Action No. C-67-155. Such an application of the doctrine is consistent with the facts of the leading Supreme Court decisions. Such an approach is also consistent with the analysis of the case law made by the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) p. 34.[21]

The Antitrust Division's position was reiterated almost verbatim in 1972 by Donald I. Baker (now petitioners' counsel), who was then Director of Policy Planning and later Assistant

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[21] Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 1983 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 50,122, 55,197 (Feb. 22, 1971) (emphasis added).

Attorney General in charge of the Antitrust Division.[22] The Justice Department's *Antitrust Guide for International Operations,* adopted in 1977, again reaffirmed the Department's long established view that the Sherman Act applies to "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." United States Department of Justice, *Antitrust Guide for International Operations* 12 n.26 (1977). The Antitrust Division's most recent statement in support of this position was made to this Court just last term when it cited *Yellow Cab* with approval and stated, "the key factor is the 'extent of control exercised by the parent over the subsidiary's business.'" (Brief of the United States at 46, *BankAmerica Corp.* v. *United States,* 103 S. Ct. 2266 (1983))[23]

The government's *amicus* brief filed in this case represents the first time since the passage of the Sherman Act that it has argued that Section 1 should be held inapplicable to the joint conduct of affiliated corporations. The government neither explains nor attempts to reconcile its previous position. Nor does the government suggest that there are any new empirical data or other information which might give rise to this turnabout. All of the arguments which the government now presses upon the Court were urged in opposition to the government's position in previous cases and were rejected by the Court.

This Court recently refused to adopt the government's similarly revisionist view of the Clayton Act in the face of its

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[22] "The 'Affiliation' Problem in Banking," Speech by Donald I. Baker to the Federal Bar Association (September 14, 1972).

[23] It is also noteworthy that the present Assistant Attorney General, Antitrust Division, recently urged Congress to treat a parent as separate from its subsidiary under the Bank Holding Company Act (12 U.S.C. § 1841, *et. seq*), "[g]iven that the holding company is *distinct* from the banking subsidiary. . . ." (Testimony of William F. Baxter, Assistant Attorney General, Antitrust Division, Concerning Competition in the Financial Services Industry, Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, June 8, 1983 at 12 (emphasis added))

contrary position over a 60 year period. *BankAmerica Corp.* v. *United States*, 103 S. Ct. 2266, 2271 (1983). As the Court noted in *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974), "for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." Not only is the government's current position contrary to congressional intent, its consistent prior position "belies its present assertion." *Id.* Indeed, it is the Antitrust Division's consistent interpretation of Section 1 since the Act's adoption as applying to affiliated corporations which should be accorded "great weight." *BankAmerica Corp., supra*, 103 S. Ct. at 2271. *See also General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-43 (1976).

II. THE PRINCIPLES ESTABLISHED BY THE DECISIONS OF THIS COURT CONSTITUTE LOGICALLY SOUND AND WORKABLE ANTITRUST POLICY.

A. The Principles Are Rational and Workable in Their Application.

In applying the principles established by the decisions of this Court, the lower courts have examined the relationship between affiliated corporations to determine: (1) whether the affiliated corporations function as distinct economic units, and (2) whether each corporation acting in concert engaged in activities designed to unreasonably restrain the trade of third parties.

Contrary to the contentions of the petitioners and *amici*, neither this Court nor lower courts have held that Section 1 liability turns solely upon the fact of separate incorporation. Indeed, such an analysis has been consistently rejected, particularly in light of this Court's holding in *Yellow Cab* that "[t]he corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." (332 U.S. at 227) This Court and the lower courts have also rejected the formalistic rule proposed by petitioners that the mere fact of

affiliation should insulate the companies from Section 1 liability. As the court stated in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054 (9th Cir.), *cert. denied*, 103 S. Ct. 57 (1982) (citations omitted):

> just as the fact of common ownership alone should not insulate corporations from the antitrust laws, this court has held that "the mere formality of separate incorporation is not, without more, sufficent to provide the capability for conspiracy."

Thus, the separate legal status of the parties is the beginning, not the end, of the inquiry. Separate persons are capable of combining only when they are also functionally separate and where holding them capable of combining would be consonant with the underlying purposes of the Act. Moreover, a finding of capacity to combine is not the equivalent of finding a Sherman Act violation, a point which petitioners and *amici* seem consistently to ignore. It must also be established that each of the participants undertook activities which ultimately resulted in a demonstrably adverse effect on competition.

1. The relationship of the affiliated corporations

An examination of the relationship between the affiliated firms is undertaken "to determine whether the corporations have 'antitrust significance as separate economic units.'" *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, *supra*, 668 F.2d at 1054. As the Court of Appeals stated in this case, the focus is "on the practical relationship between the parent and the subsidiary" to determine whether "there is enough separation between the two entities to make treating them as two independent actors sensible." (691 F.2d at 318; Cert. App. A-11) Other courts have set forth these principles in similar terms. *See, e.g., Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

The Court of Appeals here noted that the test developed by the courts "seeks the answer to the question [of separateness] in terms of evidence that is empirical, readily furnished, and amenable to development at trial. . . ." (691 F.2d at 318; Cert. App. A-12) This analysis requires consideration of a variety of specific factors designed to ascertain the functional separateness of the corporations in actual operation. *See Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); L. Sullivan, *Law of Antitrust* 326-28 (1977).[24]

Here, the facts established that Copperweld and Regal constituted separate economic operating units. As the Court of Appeals noted, the District Court's charge "emphasized to the jury that they were looking for real, rather than merely formal, distinctness . . . ." (691 F.2d at 319; Cert. App. A-13) The jury was clearly instructed that Copperweld and Regal were not capable of combining or conspiring if "they are operated in such a way as to, in effect, constitute just one company." (*Id.*) After listing the factors to be considered, the District Court instructed the jury that:

> If you find from the evidence that Regal Tube Company is not sufficiently distinct from Copperweld *as an economic*

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[24] It may not be necessary in every case to examine all of the factors to find a lack of capacity to conspire. For example, where a single person owns and operates both corporations it is evident that the corporations are not separate. *See, e.g., Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd on other grounds*, 189 F.2d 797 (4th Cir. 1951); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979). Petitioners seek to force themselves into the alien mold of the "sole decisionmaker," but they were operated as separate businesses by separate managements, and the Court of Appeals so concluded. (691 F.2d at 320; Cert. App. A-16-17)

> *entity,* then you must consider them as a single person. (691 F.2d at 319; Cert. App. A-14 (emphasis added))[25]

The Court of Appeals noted that the evidence supported the finding that "Regal management had real autonomy in both day-to-day and policy decisions. . . ." and that Regal was a separate actor in the scheme to eliminate Independence. (691 F.2d at 320-21; Cert. App. A-16-18)[26]

Without citation to any legal or economic authority, the government and petitioners argue that affiliated corporations cannot be viewed as independent in "an economic or antitrust sense." (U.S. Br. 15; Pet. Br. 22) However, where a subsidiary corporation is operated with substantial autonomy, it is, in a very real sense, a separate "economic unit." Even the government now concedes, as it must, that economists use the term "economic unit" to refer to subunits of a single firm which have sufficient resources and autonomy of operation. (U.S. Br. 8 n.7)[27] It is sensible to consider such entities separate economic

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[25] Petitioners claim here, as they did below, that the District Court changed the factors to be considered regarding separateness of operation. As the Court of Appeals noted, this contention exhibits "confusion about how a balancing test works." (691 F.2d at 319; Cert App. A-14) In an appendix to its opinion the Court of Appeals juxtaposed the District Court's instruction and the relevant portions of its opinion in *Photovest* and found them to be consistent. (691 F.2d at 318-19, 331-32; Cert. App. A-13, 14, 40-42)

[26] Petitioners also complain that the jury was not instructed to consider that Copperweld and Regal did not hold themselves out as competitors. (Pet. Br. 36) That factor, however, was irrelevant in this case because there was no assertion that there was a horizontal combination of affiliated competitors.

[27] *See, e.g.,* R. Rumelt, *Strategy, Structure and Economic Performance* 33 (1974) ("economic unit" defined as "a firm or subunit of a firm that has sufficient resources and autonomy to act on its own behalf in the market place.")

units because they are free to develop a network of contracts and other business relationships with customers, suppliers, financing sources and others which create an economic impact; in economic terms, they serve as a "nexus for contracting relationships."[28] Those relationships are necessary to conduct a business, but they can also be used to help achieve anti-competitive objectives. Thus, when the economic leverage of the business relationships of one such economic unit is combined with that of another economic unit to "strengthen an anticompetitive assault," a trade restraint can occur which is of serious antitrust concern. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., supra,* 668 F.2d at 1055.

The fact that a parent corporation would ultimately have the legal right to set in motion actions to remove the autonomy of a subsidiary through total integration does not diminish the anticompetitive injury which autonomous units have caused.[29]

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[28] Jensen and Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. Fin. Econ. 305, 311 (1976) ("The private corporation or firm is simply one form of *legal fiction which serves as a nexus for contracting relationships . . . .*") (emphasis in original). The government relies upon the definition of "enterprise" in J. Bain, *Industrial Organization* (1959), but fails to quote the following statement from Bain:

> [T]he corporation is endowed with "legal entity." It is an artificial person in the eyes of the law, separate from the persons of any shareholders, and as such can make contracts, incur debts, sue and be sued in the courts, and perform such other legally controlled commercial acts as a natural person might be entitled to do. It can do all of these things in its own name, without the direct participation of any or all of the shareholding owners. (*Id.* at 70)

[29] Similarly, the possibility that a parent might sometimes be able to direct an autonomous subsidiary to use its economic position to assist a parent in a predatory activity does not detract from the fact that it is the separate economic influence of the subsidiary derived

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The significant antitrust issue is whether the parent and subsidiary "firms have pooled their power in a manner which has adverse competitive effects on independent business entities." (Letter of Richard McLaren, Assistant Attorney General, Antitrust Division, *supra*, at 55,197)[30]

Copperweld acquired Regal as an ongoing business with its own customer and supplier relationships. Petitioners concede that Regal is engaged in a market separate from those in which Copperweld is involved. (Pet. Br. 4 n.3) The individual business relationships which Regal possessed and maintained through its autonomous operation in its separate market gave it economic influence. When that influence was combined with Copperweld's leverage with potential suppliers of Independence, substantial anticompetitive consequences resulted. As the Court of Appeals noted:

> Regal had a separate sales force and clientele (until the 1979 reorganization of Copperweld's subsidiaries) and made its own arrangements with suppliers of equipment and raw materials—a fact relevant to the ability of the

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from its business relationships which enhances the anticompetitive potential of the parent-subsidiary "combination." Such enhancement of the potential for success in achieving an unlawful objective is one of the evils at which conspiracy law is aimed. *See Callanan* v. *United States*, 364 U.S. 587, 593-94 (1961).

[30] Modern economic theory holds that ownership of corporate stock is not the equivalent of control in a realistic economic sense:

> [O]wnership of capital should not be confused with ownership of the firm. Each factor in a firm is owned by somebody. The firm is just a set of contracts covering the way inputs are joined to create outputs and the way receipts from outputs are shared among inputs. In this "nexus of contracts" perspective, ownership of the firm is an irrelevant concept. Dispelling the tenacious notion that a firm is owned by its security holders is important because it is a first step toward understanding that control over a firm's decisions is not necessarily the province of security holders. (Fama, *Agency Problems and the Theory of the Firm*, 88 J. Pol. Econ., 288, 290 (1980))

> defendants to bring pressure to bear on more people if they worked together than either could alone or than both could if Regal were a full-fledged division. (691 F.2d at 320; Cert. App. A-17 (citations omitted))

Thus, each company used the leverage of its relationships to put pressure on other firms not to deal with Independence. Regal had business relationships with mill manufacturers, real estate firms and steel suppliers. On the other hand, Copperweld had separate relationships with steel suppliers and banks. (PX 249, 431, 1100; T. 473-85, 496, 599-600, 1119-21, 1333-36, 1792-99, 2140-42, 2244-47, 2683-85, 4047-51) It was the aggregation of the power, which each company possessed individually and coordinated to influence other firms, that created the "combination" or "conspiracy" within the meaning of the Sherman Act.

2. The nature of the conduct involved

Even where it is determined that the affiliated corporations are separate economic units, courts have found no violation of Section 1 absent joint anticompetitive conduct directed at third parties. Indeed, it has only been in such relatively rare instances that a capacity to conspire has been found:

> Rarely have courts actually found affiliated corporations guilty of conspiring in violation of the Sherman Act, however, and then only in cases where, after a full trial, the facts established, either expressly or by necessary implication, that the corporations had acted without a legitimate business purpose and with anticompetitive intent. (*Chastain* v. *American Telephone & Telegraph Co.*, 401 F. Supp. 151, 160 (D.D.C. 1975) (footnote omitted))

See also General Business Systems v. *North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983); *Thomsen* v. *Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982) ("actions of affiliated corporations which touch only on internal operations and have no anti-competitive consequences cannot violate § 1"); *Reisner* v. *General Motors*

Corp., 671 F.2d 91 (2d Cir.), *cert. denied*, 103 S. Ct. 130 (1982); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 859 (N.D. Cal. 1979), *aff'd on other grounds*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

There can be no doubt that the purpose and effect of the petitioners' activities here were to restrain the trade of a third party, and the Court of Appeals explicitly so concluded. (691 F.2d at 317 n.5; Cert. App. A-9, 10 n.5)[31] Contrary to petitioners' suggestion, this activity went far beyond a unilateral interference with contract. Beginning at least as early as January 1973 and extending into 1976, Copperweld and Regal undertook to establish a broad boycott of Independence. The fact that the petitioners achieved their greatest success early in their scheme, when Yoder breached its contract with Independence, does not convert this overtly anticompetitive scheme into a simple interference with contract claim. Moreover, the evidence established that petitioners' campaign resulted not only in Yoder's cancellation of a contract, but it also affected Independence's relationship with other suppliers. (PX 562; T. 314, 2662-64, 2871-74) Thus, petitioners' concerted efforts were successful because they were able to coerce other firms to materially aid in achieving their anticompetitive aims.[32]

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[31] The District Court, in connection with the antitrust claim, specifically instructed the jury that they must determine whether petitioners' conduct "was motivated by an intent unlawfully to prevent Independence from entering the market. . . ." (T. 8481-86) Both the District Court and the Court of Appeals held that the evidence supported the jury's finding of predatory conduct. (691 F. 2d at 325; Cert. App. A-27; Cert. App. B-7)

[32] Petitioners represent that "[t]he jury thus found that identical conduct by petitioners was unilateral for purposes of the tort claim and conspiratorial for purposes of the Sherman Act claim." (Pet. Br. 7 n.7) The Court of Appeals rejected this very contention, noting the clear factual and legal differences between the tort and antitrust

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This Court has held that even where mere agents of a corporation "materially aided in the accomplishment" of an anticompetitive scheme, a "combination" exists. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 (1968); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Certainly, then, where autonomously operated corporations actively participate in an anticompetitive campaign, a combination also exists.[33]

B. The Decisions of This Court are Conceptually Sound and Logically Consistent with Other Areas of Law.

The decisions of this Court concerning affiliated corporations under Section 1 are consistent with the approach of this and other courts generally to the treatment of parent-subsidiary relationships. That approach, often characterized as "enterprise law" or "enterprise entity law," was first articulated by Professor A. A. Berle:

> [I]n a case in which one corporation owns a controlling stock interest in another it has [not] by that fact alone made a single enterprise out of two different ones. The controlling corporation has a choice. It can, if it chooses, elect to permit, or perhaps require, its subsidiary to manage its own affairs, make its own decisions, and operate as a separate enterprise, the parent retaining only an inves-

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claims. (691 F.2d at 321; Cert. App. A-18-19) In fact, the jury concluded that Regal was not vicariously liable for the tort of Copperweld, a separate corporation.

[33] Copperweld, itself, relied upon the parent-subsidiary combination doctrine to oppose a hostile takeover in *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579, 594 (W.D. Pa. 1975). In connection with related litigation, Judge Will stated:

> Although Copperweld does not say so, the real difference between its motive in *Imetal* and its motive in the present case is that in *Imetal* it was in Copperweld's best interest to establish that Copperweld and Regal operated independently of each other, whereas in the present case it was in Copperweld's best interest to endeavor to establish the opposite. (Cert. App. B-15-16)

> tor's interest. Or it can integrate the operations of the subsidiary with its own, in whole or in part, thereby bringing the two operations together into a single enterprise entity. There is no compulsion on it to adopt or refrain from either course; but the legal consequences vary with the choice. (Berle, *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343, 357 (1947))

Under this approach, the Court has held both in the antitrust area and in other areas that corporate entities "will not be summarily disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946); *see also Perma Life, supra*, 392 U.S. at 141-42.

In many other areas of the law, the basic analysis is similar to that in the antitrust field, that is, a determination is made of the extent to which affiliated firms actually operate as independent business units, and consideration is given to the objectives of the applicable statute or rule of law.[34] Such a

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[34] The issue arises in many areas of the law including: taxation, *F.W. Woolworth Co.* v. *Taxation and Revenue Dep't of New Mexico*, 102 S. Ct. 3128, 3134 (1982) (autonomous operation of parent and wholly-owned subsidiary prevented taxing the corporations as single enterprise); *In re Chrome Plate, Inc*, 614 F.2d 990, 996 (5th Cir.), *cert. denied*, 449 U.S. 842 (1980) (parent and wholly-owned subsidiary separate taxable entities despite filing consolidated tax returns); labor, *United Paperworks* v. *T.P. Property Corp.*, 583 F.2d 33 (1st Cir. 1978) (parent not bound by collective bargaining agreement between wholly-owned subsidiary and union); ownership of securities, *Engel* v. *Teleprompter Corp.*, 703 F.2d 127, 134 (5th Cir. 1983) (stock acquired by wholly-owned subsidiary is not that of the parent corporation); bankruptcy, *In re Gibraltor Amusements, Ltd.*, 291 F.2d 22 (2d Cir.), *cert. denied*, 368 U.S. 925 (1961) (parent and wholly-owned subsidiary are separate creditors under the Bankruptcy Act, 11 U.S.C. 1, *et seq.*); contract liability, *CM Corp.* v. *Oberer Development Co.*, 631 F.2d 536, 538 (7th Cir. 1980) (stock ownership, shared

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realistic analysis is essential to the "development of a workable and coherent body of law." P. Blumberg, *The Law of Corporate Groups* 25 (1983).

The United States, in its brief to this Court in *Citizens & Southern, supra,* cogently described these principles in relation to Section 1 of the Sherman Act:

> Although courts sometimes "pierce the corporate veil" by ignoring formal distinctions between a corporation and its shareholders, (*e.g.,* between a parent corporation and its wholly-owned subsidiary), that is almost invariably done in order to impose liability on entities other than the corporation that took challenged action. It is quite another matter, however, to ignore the separate corporate identities of independent firms and permit them to evade a liability on the claim that they are a single entity. See generally Berle, *The Theory of Enterprise Entity,* 47 Colum. L. Rev. 343 (1947).

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directors and other formal indicia of affiliation not sufficient to impose liability on parent for breach of subsidiary); jurisdiction and venue, *Hargrave* v. *Fibreboard Corp.,* 710 F.2d 1154, 1160 (5th Cir. 1983) (court must consider "[a]ll the relevant facts and circumstances surrounding the operations of the parent and subsidiary"); *Quarles* v. *Fuqua Industries, Inc.,* 504 F.2d 1358, 1364 (10th Cir. 1974) (a parent's "exercise of, not the opportunity to exercise, control is determinative"); service of process, *Stoehr* v. *American Honda Motor Co.,* 429 F. Supp. 763, 766 (D. Neb. 1977) (service on subsidiary is not service on parent even though 100% owned and common officers and directors because no exercise of control); indispensable parties under Rule 19 Fed. R. Civ. P., *Glenny* v. *American Metal Climax, Inc.,* 494 F.2d 651 (10th Cir. 1974) (wholly-owned subsidiary held to be an indispensable party in action brought against parent corporation); standing, *Alcan Aluminum Ltd.* v. *Franchise Tax Bd.,* 558 F. Supp. 624, 627 (S.D.N.Y. 1983) (parent corporation does not have standing to challenge wholly-owned subsidiary's tax liability); judgments, *Zenith Radio Corp.* v. *Hazeltine Research Inc.,* 395 U.S. 100, 108-12 (1969) (judgment against wholly-owned subsidiary does not bind parent); garnishment, *Dunn* v. *Printing Corp.,* 245 F. Supp. 875 (E.D. Pa. 1965) (property of wholly-owned subsidiary is not the property of parent subject to garnishment).

> To the contrary, as this Court has stated, "[o]ne who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States,* 326 U.S. 432, 437. The statutes involved here are aimed at preserving competition, and "[t]he corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 227. In determining whether, for purposes of that Act, corporations are independent entities or mere corporate shells or divisions of the same entity, *this Court has looked to the fundamental policies being vindicated as well as the indicia of corporate independence.* (Brief for the United States at 28-30, *United States* v. *Citizens & Southern National Bank, supra* (footnote omitted; emphasis added))

Petitioners and the government now assert that since some lower courts have held unincorporated divisions incapable of combination or conspiracy, this Court should rule that all affiliated corporations also lack such capacity.[35] The Court here is not presented with the issue of the legal status of unincorporated divisions; Copperweld and Regal were not only separate corporations, but they were operated as separate businesses. The indisputable fact is that there was a substantial trade restraint when these legally and functionally separate businesses prevailed upon others to refuse to deal with respondent. But, even if it were to be assumed that an unincorporated division could not, under any circumstance, engage in a Sherman Act

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[35] Petitioners rely upon two lower court decisions which held that corporations were incapable of combining with their unincorporated sales divisions because such divisions were *neither* separate functional *nor* separate legal entities. *H&B Equipment Co.* v. *International Harvester Co.,* 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). The court in *H&B* went on to find that a corporate subsidiary "marked . . . off as a distinct entity," was capable of conspiracy. (577 F.2d at 245)

combination because it was not a separate legal person, that assumption would not justify creation of an exemption for all incorporated subsidiaries, particularly since the legal incidents of separate incorporation take on economic significance. (*See* part II.A., *supra*)[36] Congress sought to interdict all unreasonable trade restraints resulting from any combination or conspiracy. Given the broad remedial purpose of the Act, it would be indeed perverse to restrict its intended coverage because the statute was not drafted or interpreted even more broadly to cover unincorporated divisions.[37] As stated by Professor Sullivan in his authoritative antitrust treatise:

> It is perfectly defensible when Congress has sought to cast a wide net to catch restraints of trade to conclude that any two legal persons can conspire. (L. Sullivan, *Law Of Antitrust* 327 (1977) (footnote omitted))[38]

Professor Sullivan goes on to point out that the next step in the analysis is to determine whether the concerted action is limited solely to internal management or "erects barriers to entry by another separate firm." (*Id.* at 328) This analysis is in accordance with the objectives of the statute and is in perfect harmony with the legal principles applied to parent-subsidiary relationships in other areas of the law.

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[36] In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 469 n.4 (1962), this Court specifically reserved ruling on the question of whether autonomously operated divisions "came within the rule as to corporate subsidiaries." However, the Court in *Poller* did hold that a combination between a corporation and its agents may violate Section 1.

[37] This Court has recently held that an incorporated subsidiary of a firm may be subject to certain legal obligations under federal statutes which do not apply to unincorporated branches. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 189 (1982).

[38] *See also* Barndt, *Two Trees or One?—The Problem of Intraenterprise Conspiracy*, 23 Mont. L. Rev. 150, 198 (1962).

C. The Principles Established by the Decisions of this Court do not Interfere with Efficient Organization and do not Lack Predictability.

This Court and the lower courts have analyzed allegations of parent-subsidiary combinations and conspiracies with great sensitivity to the legitimate activities of affiliated corporations. Indeed, former Assistant Attorney General Donald F. Turner observed that no court has found a violation where the sole purpose of the joint activities was to coordinate internal decisions; the doctrine has "always been applied to predatory or coercive conduct directed against outsiders." Interview with Donald F. Turner, *supra*, 34 Antitrust L.J. at 123.

Petitioners and *amici*, however, launch a broadside attack against these principles by posing hypothetical misapplications and theoretical conceptual difficulties that have no relationship to the case before the Court. Moreover, these objections bear little relation to reality:

1. *Amicus* Kaiser hypothesizes instances in which the application of Section 1 to the conduct of affiliated firms would be inappropriate, yet it is unable to cite a single case in which Section 1 liability has been found in such circumstances. (Kaiser Br. 11-12) Indeed, the courts have specifically declined to find liability in the cases posited by Kaiser. *See, e.g., Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co., supra,* 467 F. Supp. at 860 (coordination of pricing not unlawful); *Thomsen* v. *Western Electric Co., supra* (non-competition agreements affecting only the affiliated corporation upheld); *Reisner* v. *General Motors Corp., supra,* (consultation regarding refusal to sell not unlawful).[39]

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[39] Petitioners also argue that the doctrine should be abandoned because in the last 35 years there have been 190 "reported decisions" involving the issue. A review of petitioners' listing of cases reveals double counting of appellate and trial court decisions, (*e.g.*, Cert. App. H case nos. 4 & 14, 7 & 19, 21 & 52, 16 & 54, 33 & 71, 35 & 72, 65 & 91, 81 & 95, 64 & 99, 32 & 102, 77 & 103, 79 & 105, 97 & 111,

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2. Petitioners assert that the decisions of this Court inhibit efficiency by discouraging the creation of subsidiaries which could "secure efficiencies not obtainable through unincorporated divisions." (Pet. Br. 20)[40] There is absolutely no support, however, for the notion that the creation of subsidiaries has been deterred by reason of the Court's decisions.[41] Since liability is imposed on affiliated corporations only for engaging in predatory conduct, businesses would be discouraged from establishing or autonomously operating subsidiaries only if there were a desire to engage in such conduct. Thus, formation of subsidiaries for legitimate purposes is not discouraged.

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101 & 113, 109 & 122, 77, 125 & 148, 143 & 145, 142 & 146, 164 & 167, 170 & 173) and inclusion of decisions where the issue of parent-subsidiary combination under Section 1 was not involved at all or was only a minor aspect of the decision (*e.g.*, Cert. App. H case nos. 10, 17, 24, 25, 28, 29, 32, 37, 45, 52, 57, 61, 64, 78, 89, 102, 104, 118, 133, 138, 152, 153, 165, 168, 172, 174, 175, 178, 179, 180, 181, 184, 185, 186). Moreover, this Court recently rejected a similar contention involving a much larger number of antitrust cases stating that it "cannot be a controlling consideration here. We must take the statute as we find it." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979). *See also Id.* at 345-46 (Rehnquist, J., concurring). Petitioners also assert that the doctrine "preclude[s] summary judgment." (Pet. Br. 25) Yet, a substantial number of parent-subsidiary conspiracy claims have been summarily dismissed. (*See. e.g.*, Cert. App. H case nos. 4, 7, 13, 15, 21, 22, 26, 30, 39, 46, 47, 48, 50, 56, 60, 66, 68, 69, 70, 73, 77, 82, 83, 85, 93, 94, 98, 127, 130, 137, 139, 141, 157, 158)

[40] Petitioners' arguments are inherently inconsistent. Thus, they contend that the difference between a corporate subsidiary and unincorporated division is mere "form," yet they argue that incorporation is often necessary to achieve significant "efficiencies." (*Contrast* Pet. Br. 15-18 *with* 18-21.)

[41] The available empirical data indicate that the use of subsidiaries has grown enormously since the turn of the century. P. Blumberg, *Law of Corporate Groups* 463 (1983). Potential antitrust liability is not a factor which management experts identify as a disadvantage in the creation of corporate subsidiaries. *See, e.g.*, J. Wert and G. Henderson, Jr., *Financing Business Firms* 506-07 (6th ed. 1979).

Moreover, an unincorporated division may be operated to achieve efficiencies that derive from decentralization, but incorporation is necessary to obtain certain legal rights and privileges. These corporate privileges have the potential for enhancing autonomy (*e.g.*, limitation of liability, the right to engage in contracts and hold assets), but they have little to do with "real efficiency." (691 F.2d at 317; Cert. App. A-10) *See generally* O. Williamson, *Markets and Hierachies: Antitrust Analysis and Implications* ch. 8 (1975). In any event, this Court has never considered internal corporate efficiency as a primary Sherman Act goal, particularly when it is balanced against the statute's fundamental objective to protect competition. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 68-69 (1977) (White, J., concurring).[42]

3. Petitioners have raised the false spectre of *per se* illegality for activities of affiliated firms. In fact, as one *amicus* admits, the lower courts have declined to apply the *per se* rule to the joint conduct of affiliated firms. (Canadian Br. 18) In the instant case, the rule of reason analysis was applied, and the jury was instructed that Independence was required to prove an unreasonable restraint of trade by establishing an increase in price or restriction in product supply in the relevant market as a result of petitioners' conduct. The Court of Appeals found that the evidence amply supported the jury's finding of such an unreasonable restraint. (691 F.2d at 321-23; Cert. App. A-19-22)[43]

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[42] Under Section 7 of the Clayton Act, this Court and the Justice Department have rejected efficiency as a proper counterweight to the broader goal of protecting competition. *See FTC* v. *Procter & Gamble*, 386 U.S. 568, 580 (1967); United States Department of Justice, *Merger Guidelines* 42-43 (1982).

[43] One *amicus* suggests that this Court "make clear that *per se* rules have no application to the relationships between affiliated companies." (Canadian Br. 19 n.36) As the Court of Appeals indicated, such a ruling may well serve "as a prophylactic against unduly expansive antitrust liability." (691 F.2d at 322 n.19; Cert. App. A-21 n.19) However, since a rule of reason analysis was applied here, the Court need not reach that issue.

4. Petitioners argue that the principles established by the decisions of the Court concerning affiliated firms lack predictability. However, businessmen should expect that predatory activities designed to prevent the entry of a new competitor might result in antitrust liability, and it is such activity, not solely corporate form, which gives rise to liability.

Petitioners here were well aware of the antitrust risks of their behavior. Early in their campaign against Independence, Copperweld and Regal were advised that their activities might violate the antitrust laws. For example, Copperweld's law firm admonished:

> We must be careful not to open ourselves up to an antitrust suit by Grohne that we have harassed potential financial and equipment suppliers from doing business with him, thus restricting competition. (PX 449 at 3; J. App. A-99)

A month later, their attorneys again advised:

> Instituting an action now, even though unsuccessful, might have some good effects but I am afraid we would be met with a counterclaim that would pose serious problems. (PX 481; J. App. A-102)

In spite of these clear warnings that their conduct raised serious antitrust questions, Copperweld and Regal were undeterred.

Petitioners and *amici* claim, however, that in other cases it may sometimes be difficult to distinguish between internal management decisions that might have an incidental effect on third parties and joint conduct directed at restraining the trade of third parties. Yet, in practical application, the courts have had no difficulty in making that distinction, and neither should businessmen.[44]

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[44] Indeed, the courts undertake a similar determination in other antitrust contexts. *See Pacific Stationery & Printing Co.* v. *Northwest Wholesale Stationers, Inc.*, 1983-2 Trade Cas. (CCH) 65,616 (9th Cir. 1983); *Hawaiian Oke, supra.*

Here, for example, there was absolutely no connection between petitioners' conduct and the formulation of internal policies. The conduct here was nothing more than a blatant attempt to exclude a competitor by shutting off its sources of supply. Copperweld and Regal knew full well what they were doing as indicated by numerous documents establishing their intention to "stop Grohne," "follow his activities like a hawk," "block Grohne," "pounce on him," and "be on him like a hawk." (PX 1055, 430, 478, 479; J. App. A-91, 100, 101) Yoder certainly understood that petitioners' actions were undertaken "with the intent to scare off potential suppliers and customers" of Independence. (PX 77)

5. The government similarly expresses concern that "[i]t often is difficult in practice . . . to distinguish between 'hard' competition that benefits consumers (even if it harms rivals) and conduct that will have the long term effect of lessening competition and consumer welfare." (U.S. Br. 10) The government's argument, however, provides no basis for concluding that antitrust laws should not apply in cases, such as this, where there clearly was a "lessening of competition and consumer welfare." (*Id.*) Copperweld and Regal were not engaging in "hard competition." To the contrary, they were seeking to *avoid* hard competition with a more efficient, price-cutting firm when they sought to preclude its entry.

Since passage of the Sherman Act, defendants have contended that the Act is uncertain in "its application to various specific fact situations." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 598-99 (1976). However, this Court has repeatedly rejected such arguments as a basis for adopting either *per se* rules of lawfulness or judicial exemptions. As the Court has stated, the Act "does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for

escape." *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 359-60 (1933).[45]

6. Petitioners and *amici* also attempt to create the illusion that academic discussion is uniformly critical of the principles established by the decisions of this Court. That is incorrect. Respected antitrust authorities specifically support the application of Section 1 in circumstances such as those presented in this case. *See, e.g.,* J. von Kalinowski, *Antitrust Laws and Trade Regulation* 6.01(2)(c)(i) 6-28-31 (1982) ("Although the plurality of actors consists only of related entities, an immunity from antitrust liability is inappropriate because of the effect of the challenged conduct on outsiders."); L. Sullivan, *Law of Antitrust* 328 (1977) ("concerted action by two 'legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade."); F. Easterbrook and R. Posner, *Antitrust Law* 730 (2d ed. 1981) ("Activity within a firm or family of commonly-owned corporations is of legitimate concern only when the entity is able to exclude competition by *other* economic units. In other words, the proper question is whether there has been an exclusionary practice.")

III. PETITIONERS' PROPOSAL IS INCONSISTENT WITH ANTITRUST LAW AND POLICY.

A. Petitioners' Proposal is Inconsistent with Antitrust Objectives.

Petitioners pay lip service to this Court's admonition in *Yellow Cab* that substance should prevail over form. (Pet. Br. 42) Yet, they seek the overruling of *Yellow Cab* and the

[45] In a recent case under Section 8 of the Clayton Act, counsel for petitioners here argued that the need for predictability dictated that parents and subsidiaries should *always* be treated as separate persons. (Respondent's Joint Appeal Brief at 43-47, *In the Matter of Borg-Warner Corp. et al.,* 3 Trade Reg. Rep. (CCH) ¶ 22,049 (F.T.C. June 23, 1983))

subsequent cases which give effect to that premise and propose instead the adoption of a rule which is purely formalistic. Thus, rather than examining the substance of the relationship and the anticompetitive consequences of the conduct at issue, petitioners would have this Court blind itself to such matters and determine antitrust policy solely on the basis of percentages of paper ownership.[46] Petitioners' proposal ignores the most basic purpose of Section 1 by seeking to immunize conduct such as that found here which has had a demonstrably adverse effect on competition.

This Court's decisions clearly indicate the impropriety of a distinction based solely on majority stock ownership which, in itself, may have little relevance to actual control. In *Yellow Cab*, the affiliations ranged from 18% to 100% stock ownership. (Brief for the United States at 40, *United States* v. *Yellow Cab Co., supra*) *Kiefer-Stewart* and *Perma Life* involved two wholly-owned subsidiaries, and *Timken* involved 30% and 50% stock ownership. Under petitioners' suggested approach, some of those cases would automatically have been decided differently without regard to the effect of defendants' activities. Such mechanical rules which can achieve random results have always been rejected by the Court, precisely because the infinite variety of circumstances which may arise "make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Associated General Contractors of California* v. *California State Council of Carpenters*, 103 S. Ct. 897, 908 (1983).

Petitioners' proposal would also ignore the legal entity of the corporation and would create a legal fiction consisting of all affiliated firms (the "enterprise"), which would be considered a

[46] In the analysis of parent-subsidiary relationships in other areas of the law, majority stock ownership and common directors have been "uniformly dismissed as inconsequential in and of themselves." P. Blumberg, *The Law of Corporate Groups* 1718 (1983).

single legal person under the antitrust laws. Such a concept is foreign to the statute and its legislative history, and would allow petitioners to derive all of the advantages of separate incorporation while avoiding all of the obligations flowing therefrom.[47] Copperweld affirmatively relied upon Regal's legal and functional separateness to avoid liability in *Ayers* v. *Copperweld Corp.*, 487 F. Supp. 593, 594 (S.D. Tx. 1980). There, the court granted Copperweld's motion to dismiss because of the absence of such "degree of control" of Regal to justify disregarding their legal separateness. Of course, now that it is to petitioners' advantage to do so, they seek the creation of a new rule of law holding they are legally one. (*See* Cert. App. B-15-16)

Contrary to the contentions of petitioners and the government, their proposal would also conflict with other provisions of the antitrust laws. For example, under Section 2 of the Sherman Act, autonomously operated parent and subsidiary corporations may be found liable of conspiring together to monopolize a market. *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1342 n.2 (D.D.C. 1981); *Perington Wholesale, Inc.* v. *Burger King Corp.*, 631 F.2d 1369, 1376-77 (10th Cir. 1979). On the other hand, where it is determined that a parent corporation exercises "close articulation of control" and "direction of the policies of (subsidiary) companies as a whole" the affiliated corporations are considered together, and the offense of monopolization may be found. *United States* v. *Grinnell Corp.*, 236 F. Supp. 244, 253, 257 (D.R.I. 1964), *aff'd and remanded on other grds.*, 384 U.S. 563 (1966).[48]

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[47] On the other hand, a logical application of petitioners' "enterprise" proposal would hold a parent liable for *all* of the acts of its subsidiaries, a truly revolutionary result.

[48] Petitioners' reliance on Section 7 of the Clayton Act, 15 U.S.C. §18 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a, is misplaced. (Pet. Br. 45) The explicit language of Section 7 prohibits certain acquisitions "directly or indirectly," i.e.,

(Footnote continued on following page)

Similarly, under Section 8 of the Clayton Act, 15 U.S.C. 19, which proscribes interlocking directorates between competing corporations, the business of an autonomously operated subsidiary will not be attributed to the parent corporation in determining whether the parent and a third corporation compete. *See, e.g., Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978). The Federal Trade Commission recently concluded that under Section 8, the degree of stock ownership is not determinative. *In the Matter of Borg-Warner Corp., et al.*, 3 Trade Reg. Rep. (CCH) ¶ 22,049 (F.T.C. June 23, 1983). There, the Commission found a violation with respect to one subsidiary because of the parent's actual dominance, but refused to find a violation with respect to another subsidiary because of the absence of such control. (*Id.* at 22,663, 22,665) The Commission concluded that a blanket rule considering only stock ownership and ignoring the actual control exercised by the parent would "elevate form over substance." (*Id.* at 22,666)[49]

(Footnote continued from preceding page)

through an affiliated corporation. Since Section 7 addresses *probable* anticompetitive effects, aggregation of market shares of affiliates is necessary because centralized control may occur. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962).

[49] The courts and the FTC have also long used a control test under the Robinson-Patman Act, 15 U.S.C. §13, to determine whether a subsidiary and its parent corporation constitute separate sellers and whether a sale between a parent and subsidiary qualifies as a "sale" under the Act. The determinative factor in each instance is the actual exercise of control, not the percentage of stock ownership. *See, e.g., National Lead Co.* v. *FTC*, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); *In the Matter of Warren Petroleum Corp.*, 53 F.T.C. 268, 271-72 (1956); *Brewer* v. *Uniroyal, Inc.*, 498 F.2d 973, 977 n.2 (6th Cir. 1974). No other circuit court has adopted the holding of *Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), upon which petitioners rely. *See Schaben* v. *Samuel Moore & Co.*, 606 F.2d 831, 833 n.3 (8th Cir. 1979).

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Petitioners' proposal would similarly "elevate form over substance" by creating an artificial distinction between 50% ownership and 50% ownership plus one share without consideration of whether this *de minimus* difference in ownership results in any difference in competitive consequences. As to corporations affiliated through 50% or less stock ownership, however, petitioners' proposal would presumably retain the present standard. Thus, despite all their criticism, petitioners ultimately acknowledge the propriety of this standard for determining antitrust liability.[50]

B. Other Laws are Inadequate to Prevent Anticompetitive Activity of Affiliated Corporations.

Petitioners and *amici* acknowledge that activities of affiliated corporations may raise serious antitrust concerns. Indeed, petitioners make no attempt to defend their anticompetitive conduct. They assert, however, that Section 2 of the Sherman Act, Section 5 of the FTC Act, 15 U.S.C. § 45, and state tort laws may be invoked, yet none of these provisions is an adequate substitute for Section 1.

As noted in part I.A., *supra*, Section 1 was intended as the primary proscription of unreasonable restraints of trade. Section 2 was viewed as a supplement to Section 1 to insure that no seriously anticompetitive activity would escape statutory coverage. In light of this congressional intent, Section 1 has been broadly interpreted to prohibit trade restraints in various forms,

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Similarly, under Section 12 of the Clayton Act, 15 U.S.C. § 22, venue cannot be obtained over a parent corporation by virtue of its subsidiary's business in the jurisdiction unless the parent exercises actual control over the subsidiary. *King* v. *Johnson Wax Associates, Inc.*, 565 F. Supp. 711, 717-19 (D. Md. 1983).

[50] Similarly, a rule insulating only wholly-owned subsidiaries and their parents from Section 1 would create a wholly artificial distinction between 100% and 99% stock ownership where no practical significance attaches to such a difference in percentage ownership.

including those imposed through joint conduct of affiliated corporations. In contrast, the monopolization and attempt to monopolize prohibitions of Section 2 have been accorded more limited application and have been applied only where monopoly has been achieved or where there is a dangerous probability thereof as evidenced by substantial market share percentages. *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951). Therefore, as the courts have construed the statute, Section 2 does not adequately address the potential anticompetitive activities of affiliated corporations. The *Attorney General's Report* recognized this and concluded that Section 1 should be applied to coercive conduct of a parent and its subsidiary "though short of an attempt to monopolize." (*Attorney General's Report, supra,* at 35)

Due to the market share requirement, Section 2 is particularly inadequate to address situations, such as that presented here, in which affiliated corporations operating in different markets combine their separate economic power to restrain trade in one of those markets. *See Report to the President and the Attorney General of the National Commission for the Review of the Antitrust Laws and Procedures,* 144-45, 168 n.11 (1979) (hereafter *"Report of the National Commission"*)("the ability of Section 2 to reach obviously anticompetitive conduct has been impaired by an overly restrictive standard").

Petitioners and *amici* obviously recognize this "restrictive standard" of Section 2 as an opportunity to escape liability. Therefore, they now seek to have the Court reduce the scope of Section 1 without any change in the scope of Section 2. As a result, all joint anticompetitive conduct of affiliated corporations short of a dangerous probability of monopoly would be excused from coverage under the Sherman Act.

Section 5 of the FTC Act is equally inadequate. Not only is there no private right of action under Section 5, but it has rarely been invoked by the Commission to attack the type of conduct involved here, and neither the petitioners nor the *amici*

cite any cases in which Section 5 has been so used. Indeed, their reliance on Section 5 is a perverse twist of this Court's holdings that Section 5 encompasses the provisions of the Sherman and Clayton Acts. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966); *Fashion Originators' Guild of America, Inc.* v. *FTC.*, 312 U.S. 457 (1941).[51]

Petitioners' attempt to displace the Sherman Act with state tort laws is equally unavailing. In fact, it was the inadequacy of state law which gave rise to the need for the Sherman Act in the first instance. *See, e.g.*, 21 Cong. Rec. 2456 (1890) (statement of Sen. Sherman). Anticompetitive conduct does not necessarily constitute knowing interference with a contract or other violations of state tort law. More importantly, the application of state tort law to anticompetitive conduct does not insulate that conduct from the antitrust laws. As this Court recently stated, "we can honor the statutory purpose best by interpreting the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts. . . ." *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 569 (1982).[52]

Adoption of petitioners' proposal would not only be improper as a matter of antitrust law and policy, but would be a grave injustice to respondent. Respondent has been undeniably injured by an incontrovertible restraint of trade that caused substantial damage to competition in the structural steel tubing

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[51] Leaving the joint conduct of affiliated corporations to be judged under Section 2 and Section 5 would not provide the predictability petitioners claim to be seeking. Both sections have been soundly criticized for their lack of predictability. *Report of the National Commission, supra*, at 144, 165, 167-68 nn.7-8 (1979) ("the scope of [Section 2] is much disputed and remains unclear"); Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969).

[52] Even where state tort law is violated it does not provide an adequate remedy for anticompetitive conduct. Here, for example Respondent expended an amount almost equal to its actual damages in prosecuting this case. (Cert. App. C)

market. Respondent submitted its claim to adjudication in reliance upon this Court's long standing doctrine which petitioners themselves affirmatively adopted in their proposed jury instruction. Retroactive application of a change in that doctrine as sought by petitioners would be contrary to the basic principles of equity recognized by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-09 (1971). *See also Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 103 S. Ct. 3492, 3510 n.12 (1983) (Powell, J., concurring); *id.* at 3510-11 (O'Connor, J., concurring).

IV. CREATION OF AN ANTITRUST EXEMPTION FOR AFFILIATED CORPORATIONS IS WITHIN THE PROVINCE OF CONGRESS.

Petitioners urge the Court to adopt their "proposed rule" creating an exemption from Section 1 of the Sherman Act for the joint conduct of affiliated corporations regardless of its anticompetitive consequences. In so urging, they ask the Court to overrule 80 years of uninterrupted decisions specifically holding to the contrary. Despite numerous amendments to the Sherman Act by Congress, no legislative attempt has been made to overturn those decisions, clearly indicating congressional ratification of this Court's interpretation of Section 1. *See Herman & MacLean* v. *Huddleston*, 103 S. Ct. 683, 689 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 (1982).[53]

[53] Congress has not hesitated to amend the antitrust laws when a decision of the Court is perceived as leading to an inappropriate result. *See, e.g., Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978) (foreign governments entitled to treble damages) and the Foreign Government Damage Recoveries Act of 1982, Pub. L. No. 97-392, § 2, 96 Stat. 1964 (1982) (amending Section 4 of the Clayton Act to limit foreign governments to single damages); *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975) and the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1154 (1980).

Beyond the fact that the decisions of the Court clearly comply with congressional intent, this Court is also guided by the doctrine of *stare decisis*, which "demands respect in a society governed by the rule of law." *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2487 (1983). *Stare decisis* is not only necessary for orderly adjudication, but it also promotes the broader societal interests in evenhanded, consistent and predictable application of legal rules. *TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978).

Application of the doctrine is particularly appropriate here because (1) a statutory, not a constitutional interpretation, is at issue; (2) the question has been repeatedly examined by the Court with considerable care; and (3) the Court's decisions span several decades. *City of Akron, supra*, 103 S. Ct. at 2487 n.1. Where statutory construction is involved, "considerations of *stare decisis* weigh heavily" because "Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). In such cases, a challenger must make "a particularly strong showing . . . that [the Court has] misread the relevant statute and its history." *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 517 (1982) (White J., concurring). Petitioners have made no attempt to show that this Court has misread the statute and the legislative history. To the contrary, the Court's decisions are a clear and correct manifestation of the statutory language and legislative intent. *See* I.A., *supra*.

Just last term, in response to a request by the government to rewrite Section 8 of the Clayton Act after 60 years of consistent interpretation, this Court stated:

> While it is arguable that wise antitrust policy counsels against permitting interlocking directorates between banks and competing insurance companies, that policy must be implemented by Congress, and not by a crabbed interpretation of the words of a statute which so many in authority have interpreted in accordance with its plain meaning for so long. If changes in economic factors or considerations of public policy counsel the extension of the Clayton Act to

> the categories of interlocking directorates implicated here, it is a simple matter for Congress to say so clearly. (*BankAmerica Corp.* v. *United States, supra,* 103 S. Ct. at 2273)

This Court has repeatedly held that major reversals of antitrust law and policy such as that sought by petitioners should only be made by Congress. *Illinois* v. *Abbott & Associates, Inc.,* 103 S. Ct. 1356, 1364 (1983); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.,* 103 S. Ct. 1282, 1289 (1983); *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332, 354-55 (1982).[54] Indeed, in *Timken, supra,* the Court specifically ruled with respect to a request for exemption of affiliated corporations from Section 1 coverage that, "if such a drastic change is to be made in the statute, Congress is the one to do it." (341 U.S. at 599)

The arguments raised by petitioners and the government involve the reassessment of competing economic theories and basic public policy considerations. If there were to be a reconsideration of fundamental antitrust objectives, Congress could best resolve such issues through the weighing process of legislative analysis, hearings and debate. *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 611-12 (1972). *See also Reiter* v. *Sonotone Corp., supra,* 442 U.S. at 344-45. There are

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[54] The Court's adoption of a rule of reason analysis in preference to *per se* treatment of certain vertical restrictions in *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), only 10 years after its decision in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), is not an apt analogy for the action requested here. (U.S. Br. 27-28) In *Continental T.V.,* the Court simply revised its own standard of proof after a relatively short period of time. It did not purport to create an exemption for conduct recognized to be anticompetitive since the inception of the Act. The Court has never considered itself free to completely exclude entire segments of commerce from Sherman Act coverage. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975).

not only constitutional,[55] but practical, considerations for the Court's deference to Congress on such questions. Congress is simply in a better position than the Court to evaluate the desirability of changes in statutory law. *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532 (1982).

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[55] *See Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317-18 (1980); *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979); *TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978).

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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